

Gary M. Hoffman (*Pro Hac Vice*)
Kenneth W. Brothers(*Pro Hac Vice*)
DICKSTEIN SHAPIRO MORIN
& OSHINSKY, LLP
2101 L Street, NW
Washington, DC 20037-1526
Phone (202) 785-9700
Fax (202) 887-0689

Edward A. Meilman (*Pro Hac Vice*)
DICKSTEIN SHAPIRO MORIN
& OSHINSKY, LLP
1177 Avenue of the Americas
New York, New York 10036-2714
Phone (212) 835-1400
Fax (212) 997-9880

Jeffrey B. Demain, State Bar No. 126715
Jonathan Weissglass, State Bar No. 185008
ALTSHULER, BERZON, NUSSBAUM, RUBIN & DEMAINE
177 Post Street, Suite 300
San Francisco, California 94108
Phone (415) 421-7151
Fax (415) 362-8064

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

RICOH COMPANY, LTD.,)	CASE NO. CV 03-4669-MJJ (EMC)
Plaintiff,)	DISCOVERY MOTION
vs.)	RICOH'S NOTICE OF MOTION AND
AEROFLEX INCORPORATED, et al.,)	MOTION TO COMPEL AGAINST MATROX
Defendants.)	DEFENDANTS
)	Date: TBD
)	Time: TBD
)	Courtroom: C

CASE NO. CV 03-4669-MJJ

RICOH'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS FROM THE MATROX DEFENDANTS

NOTICE OF MOTION AND RELIEF REQUESTED**TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

PLEASE TAKE NOTICE that on a date and time to be determined in Courtroom C of the above-referenced court Ricoh Company, Ltd. (“RicoH”), will and hereby does move the Court for an order compelling Defendants Matrox Graphics, Inc., Matrox Electronic Systems, Inc., Matrox Tech Inc. and Matrox International, Inc (collectively “Matrox”) either to produce documents required by this Court’s May 8, 2006 Order, or for the imposition of a stipulation or similar evidentiary sanctions that were sought in RicoH’s motion to show cause, which led to the May 8 Order. Although discovery has closed, because it arises from the May 8 Order and depositions taken in the past two weeks, counsel for Matrox has agreed that this motion is timely if filed by June 16, 1006.

RicoH bases this motion upon the following Memorandum of Points and Authorities, the supporting declaration of Michael Weinstein and attached exhibits, all pleadings on file in this case, and such argument as may be heard by this Court.

MEMORANDUM OF POINTS AND AUTHORITIES

On February 21, 2006, RicoH filed a motion for sanctions seeking, among other things, evidentiary sanctions based upon defendants’ refusal to comply with Judge Jenkins’ July 2005 directives for defendants to disclose relevant information regarding the ASICs at issue. That motion led to the Court’s Order of May 8, 2006, which among other things obligated Matrox to supplement its declarations identifying all of the accused ASICs, as well as produce technical and financial documents: D.I. 460 at 1-4 (“The ‘product package’ for a newly identified Commercial ASIC will include, to the extent that it exists and is within the producing Defendant’s possession, custody or control, the (1) script(s), including DC setup files, (2) inputs, including RTL inputs, (3) technology library(ies), (4) log file(s) and (5) netlist(s) for the newly identified Commercial ASIC.”).

1 On May 10, 2006, Matrox provided supplemental declarations that disclosed, for the first
 2 time since the bulk of producing product packages began¹, a new ASIC code named “Maven.”
 3 Although Matrox was obligated to provide the specified technical and financial documents by no later
 4 than May 15, it did not. Instead, on June 7, Matrox’s counsel stated that Matrox could not locate any of
 5 the relevant product level documents. Weinstein Dec., Ex. 2, Chiappini Tr. at 60. The ‘product
 6 package’ documents are necessary for Ricoh’s expert to analyze the accused ASIC and document its
 7 infringement claims. Weinstein Dec. ¶ 11.

8 On June 7, 2006, Ricoh’s counsel deposed David Chiappini pursuant to Rule 30(b)(6) with
 9 respect to Matrox’s newly disclosed products. That designee testified that he was unable to identify the
 10 most basic technical facts with respect to the Maven chip. Mr. Chiappini had no personal involvement
 11 with the design or creation of the Maven chip. Based on production specification, Typhoon
 12 Technologies, another Matrox entities, designed and created, the Maven chip. He was also unable to
 13 explain why Matrox was unable to locate the relevant technical documents other than to indicate that
 14 “the design was done a very long time ago, and the company was very young at that point, and
 15 document retention wasn’t the primary objective.” Weinstein Dec., Ex. 2, Chiappini Tr. at 8).²

16 In the past few weeks, Ricoh’s counsel has repeatedly met and conferred with respect to this
 17 issue, but without success. The parties has previously stipulated that motions with respect to the newly
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 22 ¹ Maven was previously listed as a declared product as part of a first list of declared products. Weinstein Dec., Ex. 3. Maven
 23 was subsequently removed from the first declared product list in the second declared product list. Weinstein Dec., Ex. 4.
 24 The defendants beginning producing Product packages for ASIC products after the service of the second declared product
 25 list. The ASIC Maven was inserted as a relevant ASIC in the third product list, provided three weeks before the close of
 26 discovery. Weinstein Dec., Ex. 5. To date, Ricoh has not received the required and requested technical information.
 27 Weinstein Dec. ¶12.

28 ² This is not the only ASIC for which Matrox has failed to produce the relevant information. Matrox has failed to produce
 the required technical information for another Matrox chip with the code name of “Rainbow Runner”, which is included on
 the list of declared products. Weinstein Dec., Ex. 6 Ricoh has been advised by Matrox’s counsel that it was continuing to
 look for the technical information for this chip. Subsequently, Matrox’s counsel indicated that there was no data. Weinstein
 Dec. Ex. 7. To date, Ricoh has not received the required and requested technical information. Weinstein Dec. ¶13. Ricoh
 requests that the same relief requested for Maven also be applied with respect to Rainbow Runner.

1 disclosed chips and depositions need be filed by June 15; earlier this week, the parties agreed to extend
2 this by one day to June 16. Weinstein Dec. ¶14. Although the parties continue to discuss a possible
3 compromise (discussed below), on June 15, 2006, Matrox's counsel said that Ricoh would be required to
4 file a motion by June 16 in order to prevent a waiver of Ricoh's right to raise the issue with the Court.

5 Ricoh has no desire to conduct a detailed investigation into when the relevant documents
6 were destroyed, and whether Matrox failed to take adequate steps to preserve these files during the
7 pendency of this litigation. Instead, Ricoh proposed a common-sense solution to the problem: Because
8 Ricoh's infringement theory is similar for the accused Matrox chips, varying only by the nature of the
9 inputs and the libraries, the parties would stipulate that Ricoh's infringement theory against Matrox
10 would proceed in the absence of the missing technical information for the Raven and Rainbow Runner
11 ASICs. There is no dispute between the parties that if Ricoh's infringement theory is accepted by the
12 jury, all of the accused Matrox chips will be deemed infringing. In that event, the jury would be advised
13 to include the two chips in the damages calculation. Matrox would not lose its ability to present any of
14 its defenses, and the evidence would largely be the same. Although Matrox's counsel agreed to consider
15 this proposal, it also advised Ricoh that Ricoh should nonetheless file this motion to preserve its rights.
16 If a litigant knows or should have known that it failed to comply with a discovery order, it may be found
17 at fault for failure to comply with the order. *Wright v. Maritime Overseas Corp.*, 96 F.R.D. 686, 687-
18 688 (9th Cir. 1983) (dismissing action with prejudice because, "[d]espite proper and lawful demand,
19 plaintiff has refused to produce any verified discovery responses whatsoever.") A knowing and willing
20 violation of a discovery order merits a finding of bad faith against the violating litigant. *Hyde & Drath*
21 *v. Baker*, 24 F.3d 1162, 1168 (9th Cir. 1994) ("We need not consider whether the district court abused
22 its discretion in failing to consider the doctors' declarations before it dismissed the complaint because
23 there is alternative evidence of K'ung's bad faith regarding the discovery orders.") "The choice of the
24 appropriate discovery sanction is the responsibility of the trial judge and will not be reversed absent
25 abuse of discretion." *Wright*, 96 F.R.D. at 687-688. The sanction sought by Ricoh is less severe than
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those sanctions authorized by Fed. R. Civ. P. 37(b)(2), which include taking designated facts as established, prohibiting a party from introducing evidence, striking pleadings and default judgment.

Ricoh's proposal is fair and equitable. It avoids a protracted battle over when and why highly relevant evidence was lost or destroyed. It does not materially lighten Ricoh's obligation to prove infringement, nor does it unfairly prejudice Matrox. The proposed solution is far less draconian than Ricoh's original relief sought in its motion to show cause, and is within the discretion of this Court.

A proposed Order is attached.

Dated: June 16, 2006

Respectfully submitted,

Ricoh Company, Ltd.

Jeffrey B. Demain, State Bar No. 126715
Jonathan Weissglass, State Bar No. 185008
Altshuler, Berzon, Nussbaum, Rubin &
Demain
177 Post Street, Suite 300
San Francisco, California 94108
Phone: (415) 421-7151
Fax: (415) 362-8064

By: /s/ Gary M. Hoffman

Gary M. Hoffman
Kenneth W Brothers
Michael A. Weinstein
DICKSTEIN SHAPIRO MORIN &
OSHINSKY LLP
2101 L Street NW
Washington, D.C. 20037-1526
Telephone: (202) 785-9700
Facsimile: (202) 887-0689

Edward A. Meilman
DICKSTEIN SHAPIRO MORIN &
OSHINSKY LLP
1177 Avenue of the Americas
New York, New York 10036
Telephone: (212) 896-5471
Facsimile: (212) 997-9880

Attorneys for Ricoh Company, Ltd.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

RICOH COMPANY, LTD.,

Plaintiff,

v.

AEROFLEX ET AL.,

Defendants.

Case No. CV-03-4669-MJJ

**[PROPOSED] ORDER GRANTING
PLAINTIFF RICOH'S MOTION
TO COMPEL AGAINST MATROX
DEFENDANTS**

Upon consideration of RICOH'S MOTION TO COMPEL AGAINST MATROX DEFENDANTS, and supporting evidence, Defendants' Opposition, and supporting evidence, and any reply and additional argument, and having conducted a hearing on the motions, and the Court being fully advised of the premises, the Court hereby GRANTS Ricoh's Motion to Compel against Matrox Defendants.

IT IS SO ORDERED.

DATED: _____

The Honorable Edward Chen
Magistrate Judge, United States District Court